BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

EDWARD CHAMBERS	)	
Claimant	)	
VS.	)	
	)	Docket No. 212,478
BERWIND RAILWAY SERVICES COMPANY	)	
Respondent	)	
AND	)	
	)	
NATIONAL UNION FIRE INSURANCE	)	
COMPANY NY	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the Order entered by Administrative Law Judge Bryce D. Benedict on April 3, 1997, denying claimant's Motion to Set Aside the Settlement Hearing. The Appeals Board heard oral arguments on October 15, 1997.

ISSUES

The issues presented before the Appeals Board are as follows:

(1) Whether the Administrative Law Judge erred by refusing to set aside the lump sum settlement agreement entered into on May 10, 1996, between claimant and respondent.

(2) Whether the Administrative Law Judge erred by ruling the 20-day written notice provisions contained in K.S.A. 44-534 were not applicable to the settlement hearing.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant sustained an injury on June 6, 1995, when he fell and injured his lower back while working for respondent. As a result of the injury, claimant underwent surgery on his lower back to remove a herniated disc fragment. Claimant returned to work following the surgery and attempted to perform his regular job painting railway cars but was unable to continue in that job. Respondent offered claimant a job working in its toolroom issuing tools

to other workers, but after a trial of that job, claimant again experienced too much pain and discomfort to continue working. When claimant asked an adjustor with respondent's insurance carrier about his ability to collect workers compensation benefits, claimant stated he was told a settlement would need to be reached, and that each party should then go its separate way.

Claimant, then pro se, asked the insurance carrier for a settlement in the amount of $17,500; however, the insurance carrier countered with an offer to settle at $14,000, which claimant accepted. This lump-sum settlement between claimant and respondent was approved by Special Administrative Law Judge Robert M. Telthorst on May 10, 1996.

Claimant now asserts the insurance carrier engaged in fraudulent or abusive acts and practices under the provisions set forth in K.S.A. 44-5,120 in procuring the lump-sum settlement agreement. More specifically, claimant states that when he repeatedly asked the adjustor for the insurance carrier whether he should seek the advice of an attorney before agreeing to the lump-sum settlement, the insurance carrier implied that an attorney would not be necessary. Additionally, claimant argues the insurance carrier made false and misleading statements by telling claimant an attorney would take a portion of the settlement offer previously made if claimant did in fact retain counsel. Further, claimant states he was not advised he could contact an ombudsman at the Division of Workers Compensation to discuss his injury and workers compensation claim or that he could receive a second medical opinion regarding his injury. Most importantly, however, claimant states he was not informed that he might have a work disability claim under K.S.A. 44-510e for which he may be able to receive permanent partial disability benefits. Claimant believes the insurance carrier's misrepresentation and failure to inform him of these rights amounts to the concealment of material facts as set forth in K.S.A. 44-5,120.

Although claimant might have had a claim against the insurance carrier for a fraudulent and abusive act, the Appeals Board has repeatedly held that neither the administrative law judge nor the Appeals Board has jurisdiction to grant relief under K.S.A. 44-5,120, *et seq*. *See* Henning v. Fort Scott Family Physicians, Docket No. 147,308 (June 1996); Edwards v. SDS, Inc., Docket No. 184,306 (July 1994). The provisions of the Workers Compensation Act creating a remedy for fraudulent and abusive acts or practices contemplate a separate cause of action and provide for separate procedures for the enforcement of the same. *See* Elliott v. Dillon Companies, 21 Kan. App.2d 908, 908 P.2d 1345 (1996).

Besides the allegations of fraud and abuse, claimant also notes in his brief to the Appeals Board that the Special Administrative Law Judge failed to make a determination of whether the lump-sum settlement entered into on May 10, 1996, was in fact in claimant's best interests. Such a determination is specifically required by K.S.A. 44-531(a) which states, in pertinent part:

> Where all parties agree to the payment of all or any part of compensation due under the workers compensation act or under any award or judgment, and where it has been determined at a hearing before the administrative law judge that it is for the best interest of the injured employee . . . or that it will avoid

> undue expense, litigation or hardship to any party or parties, the administrative law judge may permit the employer to redeem all or any part of the employer's liability under the workers compensation act by the payment of compensation in a lump sum . . . ." (Emphasis added).

When asked to determine when a lump-sum settlement would be "for the better interest of the injured employee," under the 1955 version of K.S.A. 44-531, the Supreme Court in Johnson v. General Motors Corporation, 199 Kan. 720, 723, 433 P.2d 585 (1967), stated: "Some type of hearing on the matter is clearly contemplated, and this has always been the custom and practice. The question to be determined is one of fact, namely, Is a lump sum redemption for the better interest of the claimant?"

In response to this question, the Court pointed to several different factors which could be considered in determining whether a lump-sum settlement is in claimant's best interests. For instance, the Court felt economic hardship or necessity could be a factor as well as claimant's physical condition. Regarding claimant's physical condition, the Court noted there may be circumstances where the claimant's condition is such that there would be little reason to anticipate improvement in earning capacity. Such a situation would warrant the payment of compensation in a lump sum rather than in periodical payments. Similarly, in Roberts v. Packing Co, 95 Kan. 723, 729, 149 Pac. 413 (1915), the Court stated in arriving at its determination of whether a lump-sum settlement would be in claimant's best interests it "considers the testimony as to the nature of the injury, its effect on the earning capacity, the duration of the incapacity and the likelihood of cure or improvement . . . ." Essentially, there is no precise rule or set of factors to look at when determining whether a lump-sum payment is in claimant's best interests; however, the Court in Johnson noted "the legislature had in mind that some unusual or exceptional circumstances should exist to justify departure from the normal method of payment of compensation and termination of all rights and liabilities under a continuing award." *Id*. at 727.

Unfortunately, there is much abuse involved in the lump-sum settlement process. According to Larson in Larson's Workers' Compensation Law §82.71, 15-1264 (1997), "[i]n some jurisdictions, the excessive and indiscriminate use of the lump-summing device has reached a point at which it threatens to undermine the real purposes of the compensation system." Larson further states: "The only solution lies in conscientious administration, with unrelenting insistence that lump-summing be restricted to those exceptional cases in which it can be demonstrated that the purpose of the Act will best be served by a lump-sum award." *Id.* at 15-1266.

In response, the legislature has established a clear public policy statement in K.S.A. 44-531(a) for protecting certain workers from abuses involved in the lump-sum settlement process. That statute precludes the approval of lump-sum settlements for two years "after an employee has returned to work in cases in which the employee, who would otherwise be entitled to compensation for work disability, is not entitled to work disability compensation because of being returned to work at a comparable wage by any employer." *See* K.S.A. 44-531(a). Interestingly enough, those employees who cannot return to work or who do not

return to work at a comparable wage are not afforded this two-year moratorium on the approval of their lump sum settlements.

In the case at hand, had K.S.A. 44-531(a) afforded claimant protection against the quick approval of his lump-sum settlement, claimant may have had the opportunity to further investigate his rights to benefits under the Workers Compensation Act. Furthermore, had the Special Administrative Law Judge conducted a best interests hearing before approving claimant's lump-sum settlement, the issue of whether claimant's circumstances might have entitled him to work disability or other benefits most certainly would have been discussed. At the settlement hearing, claimant even commented that his most pressing concern was the fact he could not find employment following his work-related injury and surgery for same. However, the Special Administrative Law Judge did not pursue this possible claim for work disability nor did he make any findings concerning whether the lump-sum settlement was in claimant's best interests.

If claimant would have timely appealed the May 10, 1996, decision of the Special Administrative Law Judge approving claimant's lump-sum settlement to the Appeals Board, the Appeals Board would have had jurisdiction to determine whether the lump-sum settlement was in fact in claimant's best interests as set forth in K.S.A. 44-531(a). The authority for such review is found in Johnson where the Supreme Court noted that both past and present facts, as disclosed by an evidentiary hearing, are to be considered when determining whether a lump-sum settlement is in claimant's best interests, and that such a duty is in the nature of a judicial function for which appellate review is appropriate. *Id*. at 724.

Claimant did not appeal from the Special Administrative Law Judge's decision to approve the lump-sum settlement, however, but from the Order of Administrative Law Judge Bryce D. Benedict denying claimant's Motion to Set Aside the Settlement. Although an agreed running award entered into by the parties and approved by the administrative law judge is subject to review and modification under K.S.A. 44-528, a lump-sum settlement is not. *See* Redgate v. City of Wichita, 17 Kan. App.2d 253, 836 P.2d 1205 (1992). As such, K.S.A. 44-528 states, in pertinent part:

> "(a) Any award or modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, whether the award provides for compensation into the future or whether it does not, may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party . . . . [I]f the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a prior award, upon such terms as may be just, by increasing or diminishing the compensation subject to the limitations provided in the workers compensation act." (Emphasis added).

Although K.S.A. 44-528 allows the administrative law judge to modify settlements for fraud and other just cause, the plain language of the statute specifically excludes "lump-sum settlements approved by the director or administrative law judge" from such review and modification. Such exclusion of lump-sum settlements from the review and modification procedures outlined in K.S.A. 44-528 was approved by the Supreme Court in Peterson v. Garvey Elevators, Inc., 252 Kan. 976, 983, 850 P.2d 893 (1993). The Peterson Court examined the 1992 amendment to K.S.A. 44-528, which contains the same language excluding lump-sum settlements from review and modification as does the 1993 amendment, and stated: "Finality and certainty in lump sum settlements is a legitimate state objective and justifies excluding lump sum settlements approved by an ALJ or the director from review or modification."

The Administrative Law Judge did not have jurisdiction to review the lump-sum settlement agreement entered into between claimant and respondent and approved by the Special Administrative Law Judge. Since the Administrative Law Judge lacked jurisdiction to grant the relief sought by claimant's motion, then the Appeals Board likewise lacks jurisdiction to set aside the settlement award.

In so finding the Administrative Law Judge lacked jurisdiction to review claimant's motion, the issue of whether the Administrative Law Judge erred by ruling the 20-day written notice provisions contained in K.S.A. 44-534 were not applicable to the settlement hearing need not be reached.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the appeal by claimant should be, and is hereby, dismissed.

IT IS SO ORDERED.

Dated this ____ day of December 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: Jeff K. Cooper, Topeka, KS
Edward D. Heath, Jr, Wichita, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director